

65403-9

65403-9

RECEIVED
COURT OF APPEALS
DIVISION ONE

NOV 01 2010

NO. 65403-9

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

DAKARAI A. PEARSON,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant.

BRIEF OF APPELLANT

ROBERT M. MCKENNA
Attorney General

Eric D. Peterson
Assistant Attorney General
WSBA# 35555
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-5347

2010 NOV -1 PM 3:14
COURT OF APPEALS
DIVISION ONE

ORIGINAL

TABLE OF CONTENTS

I.	NATURE OF THE CASE.....	1
II.	ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE ISSUES	2
IV.	STATEMENT OF THE CASE	3
	A. Department Claim Administration and Wage Order	3
	B. Mr. Pearson’s Late Challenge of the Final Wage Order and Other Related Appeals at the Board of Industrial Insurance Appeals.....	10
	C. Superior Court Oral and Written Decisions.....	12
V.	STANDARD OF REVIEW.....	14
VI.	SUMMARY OF ARGUMENT.....	15
VII.	ARGUMENT	17
	A. CR 60 Does Not Apply to Unappealed—and Therefore Final and Binding—Department Orders.....	17
	1. Unappealed Department orders become final and binding under RCW 51.52.050 and .060 and <i>Marley</i> <i>v. Dep’t of Labor & Indus.</i>	17
	2. While CR 60 may apply to Board and court orders, it does not apply to unappealed Department orders	20
	3. The express limit on the Department’s ability to set aside its own orders in RCW 51.32.240 is inconsistent with applying CR 60 to unappealed Department orders	23

4.	No precedent grants CR 60 relief to excuse untimely appeal from an agency order, let alone untimely appeal from a Department order.....	27
5.	Public policy supports inapplicability of CR 60 to Department orders	29
B.	Mr. Pearson’s Failure to Timely Appeal the Department’s Final Wage Order Precludes His Belated Challenge to the Order and Mandates Summary Judgment for the Department	29
C.	Even if CR 60 Applied at the Department Level, Mr. Pearson Does Not Meet Its Criteria for Relief.....	34
D.	This Court Should Decline to Consider the Superior Court’s Oral Rulings Because They Are Not Expressed In and Are Different From the Superior Court’s Written Order	38
E.	If This Court Considers the Superior Court’s Oral Rulings Granting Relief Under Inherent Authority, the Court Should Reverse the Rulings Because They Depend on Facts Not Supported by the Record	40
F.	Equitable Relief is Available Only in Extraordinary Circumstances for Diligent Claimants, and the Record Does Not Support Equitable Relief in This Case.....	43
VIII.	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

<i>Alcantara v. Boeing Co.</i> , 41 Wn. App. 675, 705 P.2d 1222 (1985), <i>review denied</i> , 104 Wn.2d 1022 (1985)	32
<i>Ames v. Dep't of Labor & Indus.</i> , 176 Wash. 509, 30 P.2d 239 (1934)	27, 46
<i>Bjurstrom v. Campbell</i> , 27 Wn. App. 449, 618 P.2d 533 (1980)	37
<i>Chavez v. Dep't of Labor & Indus.</i> , 129 Wn. App. 236, 16 P.3d 293 (2005), <i>review denied</i> , 157 Wn.2d 1002 (2006)	33
<i>Chemical Bank v. Wash. Pub. Power Supply Sys.</i> , 102 Wn.2d 874, 691 P.2d 524 (1984)	37
<i>Columbia Rentals, Inc. v. State</i> , 89 Wn.2d 819, 576 P.2d 62 (1978)	19
<i>Deal v. Dep't of Labor & Indus.</i> , 78 Wn.2d 537, 477 P.2d 175 (1970)	25
<i>Dep't of Labor & Indus. v. Fields Corp.</i> , 112 Wn. App. 450, 45 P.3d 1121 (2002)	27, 28, 46, 47
<i>Dils v. Dep't of Labor & Indus.</i> , 51 Wn. App. 220, 752 P.2d 1357 (1988)	23
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963)	38
<i>Garrett Freightlines, Inc. v. Dep't of Labor & Indus.</i> , 45 Wn. App. 335, 725 P.2d 463 (1986)	34

<i>Hall v. State Farm Mut. Auto. Ins. Co.</i> , 133 Wn. App. 394, 135 P.3d 941 (2006)	15
<i>Hanquet v. Dep't of Labor & Indus.</i> , 75 Wn. App. 657, 879 P.2d 326 (1994), <i>review denied</i> , 125 Wn.2d 1019 (1995)	38
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 595 (1993)	32
<i>Harman v. Dep't of Labor & Indus.</i> , 111 Wn. App. 920, 47 P.3d 169 (2002), <i>review denied</i> , 147 Wn.2d 1025 (2002)	15, 44, 45
<i>Homemakers Upjohn v. Russell</i> , 33 Wn. App. 777, 658 P.2d 27 (1983)	34
<i>Hyatt v. Dep't of Labor & Indus.</i> , 132 Wn. App. 387, 16 P.3d 148 (2006), <i>review denied</i> , 159 Wn.2d 1004 (2007)	23, 33
<i>In re Marriage of Knutson</i> , 114 Wn. App. 866, 60 P.3d 681 (2003)	36
<i>In re Welfare of MG</i> , 148 Wn. App. 781, 201 P.3d 354 (2009)	36
<i>Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.</i> , 121 Wn.2d 776, 854 P.2d 611 (1993)	22
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997)	23, 27, 28, 43
<i>Kustura v. Dep't of Labor & Indus.</i> , 142 Wn. App. 655, 175 P.3d 1117 (2008), <i>aff'd</i> , 169 Wn.2d 81, 233 P.3d 853 (2010)	47
<i>Leschner v. Dep't of Labor & Indus.</i> , 27 Wn.2d 911, 185 P.2d 113 (1945)	47
<i>Loveridge v. Fred Meyer, Inc.</i> , 125 Wn.2d 759, 887 P.2d 898 (1995)	31

<i>Lynn v. Dep't of Labor & Indus.</i> , 130 Wn. App. 829, 125 P.3d 202 (2005)	33
<i>Marley v. Dep't of Labor & Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994)	passim
<i>Morin v. Harrell</i> , 161 Wn.2d 226, 164 P.3d 495 (2007)	14, 15
<i>Peoples State Bank v. Hickey</i> , 55 Wn. App. 367, 777 P.2d 1056, <i>review denied</i> , 113 Wn.2d 1029 (1989)	35
<i>Phillips v. Dep't of Labor & Indus.</i> , 49 Wn.2d 195, 298 P.2d 1117 (1956)	23
<i>Price v. Kitsap Transit</i> , 125 Wn.2d 456, 886 P.2d 556 (1994)	25
<i>Pybas v. Paolino</i> , 73 Wn. App. 393, 869 P.2d 427 (1994)	38
<i>Quigley v. Barash</i> , 135 Wash. 338, 237 P. 732 (1925)	39
<i>Rabey v. Dep't of Labor & Indus.</i> , 101 Wn. App. 390, 3 P.3d 217 (2000)	27, 44, 45, 47
<i>Rains v. Public Disclosure Comm'n</i> , 100 Wn.2d 660, 674 P.2d 165 (1983)	32
<i>Rector v. Dep't of Labor & Indus.</i> , 61 Wn. App. 385, 810 P.2d 1363 (1991), <i>review denied</i> , 117 Wn.2d 1004 (1991)	17
<i>Rhoad v. McLean Trucking Co., Inc.</i> , 102 Wn.2d 422, 686 P.2d 483 (1984)	48
<i>Rodriguez v. Dep't of Labor & Indus.</i> , 85 Wn.2d 949, 540 P.2d 1359 (1975)	27, 46
<i>Rose v. Dep't of Labor & Indus.</i> , 57 Wn. App. 751, 790 P.2d 201 (1990)	34

<i>Rosenberg v. Rosenberg</i> , 141 Wash. 86, 250 P. 947 (1926)	37
<i>Shum v. Dep't of Labor & Indus.</i> , 63 Wn. App. 405, 819 P.2d 399 (1991)	20
<i>Somsak v. Criton Health Technologies/Health Tecna, Inc.</i> , 113 Wn. App. 84, 52 P.3d 43 (2002)	33
<i>State v. McCormack</i> , 117 Wn.2d 141, 812 P.2d 483 (1991), <i>cert. denied</i> , 502 U.S. 1111, 112 S. Ct. 1215, 117 L. Ed. 2d 453 (1992)	14
<i>State v. Santos</i> , 104 Wn.2d 142, 702 P.2d 1179 (1985)	36
<i>Stuckey v. Dep't of Labor & Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996)	23, 25
<i>Topliff v. Chicago Ins. Co.</i> , 130 Wn. App. 301, 122 P.3d 922 (2005)	36
<i>VanHess v. Dep't of Labor & Indus.</i> , 132 Wn. App. 304, 16 P.3d 583 (2006)	33
<i>Whatcom County v. Brisbane</i> , 125 Wn.2d 345, 884 P.2d 1326 (1994)	25
<i>Nilsen v. City of Moss Point</i> , 701 F.2d 556 (5th Cir. 1983)	19

Statutes

RCW 34.05.030(2)(c)	21
RCW 51.04.010	17, 22
RCW 51.08.178	30, 33
RCW 51.28.040	23
RCW 51.32.055	21

RCW 51.32.160	23
RCW 51.32.220	23
RCW 51.32.225	23
RCW 51.32.240	passim
RCW 51.32.240(2)(b)	16, 26, 31, 48
RCW 51.52.050	passim
RCW 51.52.060	passim
RCW 51.52.104	22, 34
RCW 51.52.106	22
RCW 51.52.115	42
RCW 51.52.130	34
RCW 51.52.140	16, 21

Rules

CR 1	20
CR 56(c)	14
CR 60	passim
CR 60(b)	passim
CR 60(c)	23
FRCP 60	23
FRCP 60(b)	23

Regulations

WAC 263-12-125	21
----------------	----

WAC 263-12-145	34
----------------	----

Other Authorities

Rutledge, <i>A New Tribunal In the State of Washington</i> , 26 Wash. L. Rev. 196 (1951)	21
---	----

Wright & Miller & Kane, <i>Federal Practice and Procedure</i> : Civil 2d § 2865	23
--	----

Wright & Miller & Kane, <i>Federal Practice and Procedure</i> : Civil 2d § 2868	23
--	----

Appendix of Statutes and Rules

RCW 51.32.240

RCW 51.52.050

RCW 51.52.060

RCW 51.52.140

CR 60

I. NATURE OF THE CASE

This workers' compensation case concerns whether CR 60 operates to expand the statutory time frame to challenge orders of the Department of Labor and Industries (Department) in its ex parte claim adjudication. The Industrial Insurance Act permits parties to challenge erroneous Department orders within 60 days of their receipt of the orders. If not timely appealed, the orders become res judicata. It is undisputed that Dakarai A. Pearson received but failed to timely protest or appeal a Department order that set his wage rate for time-loss wage replacement benefits. The superior court erred in applying CR 60 to undo the finality of the order. Further, although the superior court's written order was limited to CR 60, the undisputed facts in this case do not support the court's oral rulings as to Mr. Pearson's alleged diligence and reliance, on which bases the court orally discussed the possibility of relief using its inherent equitable authority. The facts do not justify equitable relief. The Court should reverse the superior court's summary judgment for Mr. Pearson and direct that summary judgment be granted for the Department.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting Mr. Pearson's summary judgment motion and denying the Department's

cross motion by incorrectly concluding that CR 60 may apply to undo the final Department order. CP 7-10.

2. Even if CR 60 may apply to a Department order issued under Title 51 RCW, the superior court erred in concluding that Mr. Pearson met the criteria for relief under CR 60(b)(1) or (11). CP 7-10.
3. To the extent the superior court granted relief under its inherent equitable authority, the court erred in doing so. CP 7-10.
4. The superior court erred in awarding attorney fees and costs to Mr. Pearson. CP 7-10.

III. STATEMENT OF THE ISSUES

- 1) The Industrial Insurance Act provides for a 60-day period to appeal a Department order, and a Department order even with an obvious error becomes res judicata if not timely appealed, unless the court grants extraordinary relief. Does CR 60, which applies to judgments and orders of the court, expand the 60-day statutory appeal period for orders of the Department?
- 2) Even if CR 60 did apply to an unappealed Department order, did the court err in granting relief under CR 60(b)(1) and (11), where Mr. Pearson knew at time of the order that when injured he received housing and meals from his employer, and did he not request relief under CR 60(b)(1) within one year of the order, and did not show extraordinary circumstances under CR 60(b)(11)?
- 3) The Department must make determinations in the first instance before the administrative appeals tribunal or court may consider the issue. If CR 60 applies to an unappealed Department order,

must the Department make the initial determination whether to grant CR 60 relief here?

- 4) If the superior court exercised its inherent authority to grant equitable relief to Mr. Pearson—and no finding to that effect is in the court’s written order—did the court abuse discretion in doing so when Mr. Pearson received, read, and understood, but failed to timely appeal the wage order, and his excuse was that he thought he orally protested?

IV. STATEMENT OF THE CASE

A. Department Claim Administration and Wage Order

Dakarai A. Pearson was injured in the course of his employment with AF2, LLC (employer), in May 2006. CABR at 14.¹ Mr. Pearson played defensive back for the Everett Hawks arena football team and was injured during practice. CABR, Testimony Pearson, Tr. 8/5/08, at 11. The Department allowed Mr. Pearson’s claim. CABR at 14.

On July 11, 2006, the Department issued an order setting Mr. Pearson’s wage rate (initial wage order), accompanied by a letter of explanation. CABR, Exhibit 1 at 2-4. The initial wage order did not include employer-provided payments for “Housing/Board/Fuel.” CABR, Exhibit 1 at 3-4. One day later, Mr. Pearson faxed to the Department documents contending that he received housing and board from his

¹ “CABR” references the Certified Appeal Board Record. The Clerk’s Papers did not renumber the CABR. References to Board pleadings and orders are to the page number stamped by the Board in the lower right corner of the page. Transcripts in the CABR are separately numbered, and references will be to the name of the witness and page number of the transcript. One exhibit was admitted upon stipulation of the parties and is contained at the end of the CABR; each page of the exhibit is separately numbered in the lower right corner.

employer. CABR, Exhibit 1 at 6-8. The Department considered his documents as a timely protest of the initial wage order. CABR, Exhibit 1 at 35. In the documents, Mr. Pearson stated he would soon provide the amount spent by his employer on his apartment, and he was attaching information on per diem pay and his meals. CABR, Exhibit 1 at 6. The day after receiving this fax, the Department's claims manager spoke to an employer representative about wage issues. CABR, Exhibit 1 at 9. The employer representative planned to check with others in the organization and provide further wage information to the Department. *Id.* The following week, the employer provided to the Department a copy of Mr. Pearson's contract of employment. CABR, Exhibit 1 at 10-26.

After reviewing the contract, the claims manager spoke on August 1, 2006 to Mr. Pearson about his employer-provided apartment. CABR, Exhibit 1 at 27. The claims manager also wrote that day to Mr. Pearson's employer, asking for clarification of wage information. CABR, Exhibit 1 at 29. On August 3, 2006, the Department received from Derrick Sloboda, Workers' Compensation Coordinator at the employer, a fax that answered the Department claims manager's question as follows:

What was the amount paid for his apartment? (Newberry Square Apartments Rm #311 Lynnwood WA) \$734 per month? None paid [handwritten answer]

CABR, Exhibit 1 at 30-31. After receiving this fax, the Department claims manager requested records from Mr. Pearson concerning his wages from prior employment in order to ensure his time-loss rate was correctly computed. CABR, Exhibit 1 at 33-34. In the meantime, the Department retracted the initial wage order. CABR, Exhibit 1 at 35.

The claims manager spoke several times to Mr. Pearson concerning wage and other claim related information in the next weeks and months. CABR, Exhibit 1 at 36-54, 108-112; Testimony Pearson, Tr. 8/5/08, at 15-23. Mr. Pearson understood through those conversations² that his employer reported to the Department it did not pay for housing:

Q: Through your conversations with [your claims manager], did you understand that the employer had told him “none paid” for housing?

A: Yes.

Q: Would that have been in the summertime of 2006 that you understood that through [your claims manager]?

A: I don't remember exactly. I can't remember exact date. Was it actually in the summer or was it actually right after the summer? I don't recall dates. I just can't.

Q: That would have been in the calendar year 2006, though, correct?

A: Correct.

² At time of testimony, Mr. Pearson had difficulty recalling which conversations with his claims manager took place after the July 11, 2006 wage order versus after the December 12, 2006 wage order versus after the August and September 2007 denials of reconsideration of the December 12, 2006 wage order because of lack of timely protest or appeal. See CABR, Testimony Pearson, Tr. 8/5/08, at 15-23; CABR, Exhibit 1 at 68-70. Mr. Pearson explained: “I don't recall dates. I just can't.” CABR, Testimony Pearson, Tr. 8/5/08, at 19 ll. 4-5.

CABR, Testimony Pearson, Tr. 8/5/08, at 18-19. The claims manager testified he told Mr. Pearson in August 2006 that the employer responded “none paid” when asked the amount they paid for Mr. Pearson’s apartment. CABR, Testimony Vaughn, Tr. 8/5/08, at 31. The claims manager continued: “We had many discussions regarding this. [Mr. Pearson] was fully aware of the discussion. We talk[ed] several times a week on that.” *Id.* See also CABR, Exhibit 1 at 36-54, 108-12.

Also in this time period, the Department had an investigator verify further information from Mr. Pearson’s employer, to include amounts Mr. Pearson was paid and whether he was paid per diem or for housing. CABR, Exhibit 1 at 113-14. A Department investigator talked to an employer representative on August 31, 2006, who stated in pertinent part:

The players during the season do live in apartments that the team pays for/contracts with, but money is not given to the players to pay for the housing. The same with food, players are provided with food, but they do not received [sic] food money in the form of separate per diem checks.

CABR, Exhibit 1 at 113. Mr. Sloboda’s explanation for why he wrote “none paid” in response to the claim manager’s inquiry regarding housing is similar to what the other employer representative stated to the Department’s investigator. Mr. Sloboda testified: “The players aren’t allowed to accept a housing stipend. So there was no housing stipend paid to [Mr. Pearson].” He expressed confusion because of the wording of the

question in relation to league rules: “I read [the claim manager’s question] in that way because it discussed a specific amount per month . . . it’s like it was a stipend. Like it is money that was handed over to a player for his housing and that just doesn’t occur in AF2.” CABR, Testimony Sloboda, Tr. 8/5/08, at 42. Mr. Sloboda did not intend to deceive any persons nor the Department concerning Mr. Pearson’s wage rate, nor did he intend to minimize Mr. Pearson’s benefits. *Id.* at 43.

After the multiple oral and written communications with Mr. Pearson and his employer concerning Mr. Pearson’s wage information, the Department issued a new wage order on December 12, 2006 (final wage order). The order stated in pertinent part with respect to additional wages for the job of injury: “Housing/Board/Fuel NONE per month.” CABR, Exhibit 1 at 56-57. The order also included wages for a second job based on a monthly average of Mr. Pearson’s earnings in the year before injury. *Id.* In determining there were no employer contributions to housing, the claims manager apparently failed to realize the employer representatives’ confusion in responding to the claims manager’s letter and investigator’s questions. Both employer representatives appeared to understand the Department to be asking whether the employer paid stipends for housing and food, which arena football league rules prohibited as a competitive advantage. CABR,

Testimony Sloboda, Tr. 8/5/08, at 42; CABR, Exhibit 1 at 113. The claims manager did not express any intent to minimize Mr. Pearson's benefits. CABR, Testimony Vaughn, Tr. 8/5/08, at 24-31.

The final wage order informed the parties of their appeal rights and consequences of failure to appeal:

THIS ORDER BECOMES FINAL 60 DAYS AFTER THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE APPEALS.

...

CABR, Exhibit 1 at 56-57. Accompanying the final wage order was a letter that further explained the order. The letter stated in pertinent part:

I have reviewed the information in your file and have issued an order that sets your wages. These wages are used in determining the rate of your time-loss compensation benefits. If "NONE per month" is listed in the additional wages section, this means:

The wage or benefit is not part of your monthly earnings or,

On the date of injury or disease manifestation, the employer was not contributing to or providing the benefit, or you were not eligible for the benefit.

Please review the information on the order carefully to ensure there are no errors.

CABR, Exhibit 1 at 55. The letter stated Mr. Pearson must file a written protest if he disagrees with the December 12, 2006 order, "or it will become final." *Id.* The Department made time-loss payments to

Mr. Pearson in following periods based on the wage rates set by the final wage order. CABR, Exhibit 1 at 58-62.

Mr. Pearson admitted he received the final wage order and read it in its entirety. CABR, Tr. 8/5/08, at 9-10 (stipulation of receipt on December 15, 2006); CABR, Testimony Pearson, Tr. 8/5/08, at 21-22. Mr. Pearson further admitted he did not within 60 days of his receipt of the final wage order file a *written* protest or appeal. CABR, Testimony Pearson, Tr. 8/5/08, at 22-23.

Mr. Pearson testified he believed he called the Department's claims manager within 60 days of his receipt of the final wage order in purported appeal of it. CABR, Testimony Pearson, Tr. 8/5/08, at 22. But the claims manager testified that none of his oral conversations with Mr. Pearson within 60 days of his receipt of the order concerned wage issues. CABR, Testimony Vaughn, Tr. 8/5/08, at 28-30. The Department did not receive a timely written protest or appeal of the final wage order from any party. *Id.*

While the final wage order states Mr. Pearson did not receive employer-provided housing, it appears he in fact did. Mr. Pearson shared employer-provided housing with two other Everett Hawks players. CABR, Testimony Pearson, Tr. 8/5/08, at 22. The monthly rental value of the unit was \$737.50. CABR, Exhibit 1 at 75. While the final wage order

also states that Mr. Pearson did not receive monthly “board” from his employer, Mr. Pearson testified that he received meal cards valued at \$24 per meal, for three meals per week, for use at four to five restaurants. CABR, Testimony Pearson, Tr. 8/5/08, at 12-13.

B. Mr. Pearson’s Late Challenge of the Final Wage Order and Other Related Appeals at the Board of Industrial Insurance Appeals

The Department received Mr. Pearson’s protest of the December 12, 2006 wage order on March 8, 2007, nearly three months after Mr. Pearson’s admitted receipt of the order. CABR, Exhibit 1 at 63-65. This protest was in the form of a notice of representation by Mr. Pearson’s present counsel, which stated in pertinent part: “**Protest & Request for Reconsideration**: If a determinative order has been issued which adversely affects the rights of the undersigned, this constitutes a Protest and Request for Reconsideration of that order.” CABR, Exhibit 1 at 65 (emphasis in original).

The notice of representation, on its face, appears to have been signed by Mr. Pearson on January 21, 2007, which is within 60 days from the communication to Mr. Pearson of the December 12, 2006 wage order.³

³ Mr. Pearson’s counsel represented in superior court that he sent to notice to the Department as soon as he received it. See Verbatim Report of Proceedings (VRP) at 8, where the Court noted in reference to earlier proceedings: “Now, counsel [for Mr. Pearson] has represented to the Court as an officer of the court that his office didn’t receive it by that time.”

No evidence or testimony in the record explains why roughly six weeks passed from the apparent date of signature and the filing with the Department of the notice of representation. The notice of representation was not transmitted to the Department until the day before it was filed. CABR, Exhibit 1 at 63 (cover letter dated March 7, 2007). Mr. Pearson then filed a more specific protest of the December 12, 2006 wage order, received by the Department on March 19, 2007. CABR at 14.

The Department issued an order stating that it could not adjust Mr. Pearson's wage rate for his receipt of employer-provided housing or meals because no party timely protested or appealed the December 12, 2006 wage order. CABR, Exhibit 1 at 67. Upon Mr. Pearson's protest, the Department on September 17, 2007 affirmed its determination. CABR, Exhibit 1 at 69. Mr. Pearson appealed to the Board of Industrial Insurance Appeals (Board). CABR, Exhibit 1 at 71-72. Mr. Pearson also appealed two other Department orders to the Board, but he challenged only the amount of time-loss benefits in these orders that were based on the December 12, 2006 order. CABR, Exhibit 1 at 66-70 (August 30, 2007 order and October 2, 2007 order); Tr. 8/5/08, at 6-8.

Mr. Pearson's notice of appeal to the Board did not state a request for relief under any provision of CR 60. CABR at 17-18. The parties participated in a prehearing conference where issues were identified and a

litigation schedule was set. CABR at 33. The order upon this conference determined that the issue presented was: “Whether claimant’s untimely protest of a December 12, 2006 Department order should be excused due to *misrepresentation* by the employer.” CABR at 34 (emphasis added). In accordance with the schedule, an industrial appeals judge of the Board heard testimony and received stipulated exhibits. Following presentation of evidence, the judge received the parties’ briefing. CABR at 44-45, 46-55. In this briefing, Mr. Pearson alleged entitlement to relief under CR 60(b)(1) and/ or (11). CABR at 44-45.

The Board judge issued a proposed decision that affirmed the Department orders on appeal. CABR at 12-16. The proposed decision rejected Mr. Pearson’s contention that unappealed Department orders may be set aside under CR 60(b), saying that “[Mr. Pearson’s] argument . . . is not supported by any precedent, or persuasive argument.” CABR at 14. Mr. Pearson petitioned the three-member Board for review, seeking relief under CR 60(b)(1) and (11). CABR at 3-8. The Board denied review, adopting the proposed decision as its final decision. CABR at 1. Mr. Pearson appealed to Snohomish County Superior Court.

C. Superior Court Oral and Written Decisions

In the superior court, both Mr. Pearson and the Department moved for summary judgment. CP at 62-73, 36-61. In an oral ruling at the

summary judgment hearing, Judge Eric Lucas stated the court was awarding equitable relief under its inherent authority; the court did not address relief under CR 60. VRP at 7-8; CP at 21 (minute entry from 2/17/10 summary judgment hearing). The court drew inferences in Mr. Pearson's favor when granting his motion for summary judgment. CP at 21. The bases for relief stated in the oral ruling concerned Mr. Pearson's alleged diligence and reliance on his attorney. CP at 21; VRP at 8-9.⁴

The parties could not agree on the content of the superior court's written summary judgment order. Mr. Pearson proposed an order that did not at all mention the superior court's oral rulings as to his reliance on his attorney or diligent pursuit of his right to appeal. CP at 12-15. The Department proposed an order that contained its understanding of the superior court's oral ruling. CP at 17-20.

At the later hearing on the parties' presentation of the proposed orders,⁵ the superior court further explained the court's earlier oral ruling as to diligence and reliance. VRP at 7-10. However, the superior court's written order grants relief to Mr. Pearson under CR 60, not under the

⁴ Additional facts regarding the superior court's oral ruling are set forth in Sections VII.D and VII.E below.

⁵ This hearing was transcribed by a court reporter, but the summary judgment motion hearing was not. The superior court read its minute entry from the summary judgment hearing into the record when announcing its oral ruling on the proposed orders.

court's inherent equitable authority. CP at 7-10.⁶ The written order does not include findings or conclusions concerning Mr. Pearson's diligence or his reliance on his attorney. *Id.* Rather, the written order determines that the Department's final wage order was a mistake or irregularity under CR 60(b)(1) and that relief for other circumstances is appropriate under CR 60(b)(11), stating the Department deviated from the normal course of proceedings. *Id.* It is from the superior court's written order that the Department appeals.

V. STANDARD OF REVIEW

This Court reviews de novo the superior court's grant of summary judgment to Mr. Pearson and denial of the Department's cross motion. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c). Here, both parties argued no genuine issue exists as to the applicability of CR 60 to the Department orders. Applicability of CR 60 to unappealed Department orders is a legal issue reviewed de novo. *See State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111, 112 S. Ct. 1215, 117 L. Ed. 2d 453 (1992) (de novo review where issues involve solely questions of law).

⁶ The court signed Mr. Pearson's proposed order without modification. *See* CP at 7-10; CP at 12-16.

Although the superior court's written order addresses only CR 60 as the basis for relief, the court's oral rulings suggested inherent equitable relief. CP at 21; VRP at 7-8. If this Court considers the superior court's oral rulings, the Court must determine whether the superior court correctly applied summary judgment standards when it drew inferences from the evidence in Mr. Pearson's favor when granting him summary judgment. *See Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 398, 135 P.3d 941 (2006) (court must construe evidence in the light most favorable to non-moving party). Whether the superior court correctly applied summary judgment standards would be a legal issue reviewed de novo. *See Morin*, 161 Wn.2d at 230. Only if the superior court's oral rulings are supported by the record and consistent with the summary judgment standard of review would the Court then review the grant of equitable relief under the court's inherent authority for abuse of discretion. *See Harman v. Dep't of Labor & Indus.*, 111 Wn. App. 920, 923, 47 P.3d 169 (2002), *review denied*, 147 Wn.2d 1025 (2002).

VI. SUMMARY OF ARGUMENT

The primary issue in this case is whether CR 60 applies to an unappealed Department order. As a matter of law, it does not. The Industrial Insurance Act requires parties aggrieved by a Department order to file a protest or appeal within 60 days of communication.

RCW 51.52.050 and .060; RCW 51.32.240(2)(b). Even an erroneous Department order, if not timely appealed, is res judicata and cannot be reargued by a claimant. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-39, 886 P.2d 189 (1994). Applying CR 60 to set aside the unappealed wage order would be inconsistent with the carefully crafted statutory scheme and precedent and would undercut the policy of finality served by res judicata.

While CR 60 applies to Board orders upon timely appeal from a Department order by virtue of RCW 51.52.140, no provision in law permits use of CR 60 to challenge an unappealed Department order. RCW 51.32.240, not CR 60, is the sole pertinent means available for correcting unappealed Department orders, and this provision prohibits adjustment for adjudicator error absent timely protest or appeal. RCW 51.32.240(2)(b).

To the extent this Court considers the superior court's oral rulings referencing its inherent equitable authority, in addition to the contents of the superior court's written order, no factual or legal basis supports the rulings. Equitable relief requires a showing of due diligence. Mr. Pearson testified only that he thought he orally protested within the appeal period, even though documents he received clearly informed him that a *written* request was required. As a matter of law, an oral protest—even if the

record showed one had been made—does not constitute due diligence that would permit extraordinary relief. The fact that the December 12, 2006 wage order was incorrect is not enough under the law to justify equitable relief. Upon the facts present here, equitable relief is inappropriate.

VII. ARGUMENT

A. **CR 60 Does Not Apply to Unappealed—and Therefore Final and Binding—Department Orders**

CR 60 cannot be applied to set aside Department orders that are unappealed, and therefore final and binding. Application of CR 60 at the Department level is not authorized in statute, regulation, or case law, and would be unsound policy.

1. **Unappealed Department orders become final and binding under RCW 51.52.050 and .060 and *Marley v. Dep't of Labor & Indus.***

The Industrial Insurance Act, Title 51 RCW, is a self-contained system, and workers' compensation cases are “governed by [its] explicit statutory directives.” *Rector v. Dep't of Labor & Indus.*, 61 Wn. App. 385, 390, 810 P.2d 1363 (1991) (common law “discovery” rule does not apply as an exception to the express limitations periods provided in Title 51 RCW), *review denied*, 117 Wn.2d 1004 (1991). RCW 51.04.010 withdraws workers' injury claims from private controversy, abolishing “all jurisdiction of the courts of the state over such causes” except as provided in Title 51 RCW.

Two provisions of the Act establish the time period within which a Department order may be contested. RCW 51.52.050 imposes a 60-day limit on requests for reconsideration. RCW 51.52.050(1) states: “such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department . . . or an appeal is filed with the board” RCW 51.52.060 imposes the same 60-day limitation on appeals to the Board from Department orders. RCW 51.52.060 provides:

Except as otherwise specifically provided in this section, a worker . . . aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board.

RCW 51.52.060(1)(a).

The Legislature provided that erroneous orders of the Department must be challenged within 60 days of communication or the order becomes final. The remedy for a claimant to attack an order that is in error or is a mistake on the facts is for that claimant to timely protest or appeal. RCW 51.52.050 and .060.

Unappealed Department orders are given the same res judicata effect as unappealed court decisions. *Marley*, 125 Wn.2d at 537.⁷ *Marley* provides:

[A]n order or judgment of the department resting upon a finding, or findings, of fact becomes a complete and final adjudication, binding upon both the department and the claimant unless such action . . . is set aside upon appeal or is vacated for fraud or something of like nature. . . .

125 Wn.2d at 537-39 (internal citations and footnote omitted). The Department's power to decide a controversy includes the power to decide wrongly; an incorrect decision, entered with jurisdiction, is as binding on all parties as a correct one. *Id.* at 543 ("Obviously the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law.") (internal quotations omitted).

The superior court's conclusion here that CR 60 applies to an unappealed, and therefore final, Department decision, is inconsistent with

⁷ The proper method to challenge a decision is to bring an appeal at the time the court, Board, or Department order is issued. *Marley*, 125 Wn.2d at 537 ("If a party to a claim believes the department erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.").

This rule controls even where a later court decision in an unrelated case overturns the precedent on which the order was based. *Nilsen v. City of Moss Point*, 701 F.2d 556, 564 (5th Cir. 1983) (changes in law do not prevent application of res judicata); *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 822-23, 576 P.2d 62 (1978). Thus, even where the sympathies are greater than here, i.e., in cases where parties who previously litigated claims to adverse final judgments later learn that another party has succeeded in reversing longstanding precedent, courts do not set aside res judicata principles. *Id.*

the res judicata principles established in *Marley*. The validity and vitality of *Marley* affects adjudication of every workers' compensation claim, as the Department issues multiple orders in every claim, and ongoing claim adjudication often depends on finality of the Department's past actions.

2. While CR 60 may apply to Board and court orders, it does not apply to unappealed Department orders

Court orders may be challenged under CR 60, which permits relief from the failure to timely appeal a *court* judgment in the interest of equity in certain circumstances. CR 60(b) states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- ...
- (11) Any other reason justifying relief from the operation of the judgment. . . .

The Civil Rules apply to proceedings in the *courts*. CR 1 states: "These rules govern the procedure in the superior court in all suits of a civil nature. . ." A court's order in an industrial insurance claim may be corrected under CR 60. *See Shum v. Dep't of Labor & Indus.*, 63 Wn. App. 405, 408, 819 P.2d 399 (1991) (motion to superior court to correct the court's own earlier decision in the case).

CR 60 may apply to Board orders issued upon timely appeals from Department orders. By statute, the Civil Rules apply to appeals at the Board. RCW 51.52.140 (“Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter.”); WAC 263-12-125 (“Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed.”).

No statute or regulation applies the Civil Rules to the Department’s ex parte claim adjudication process. RCW 51.52.140 does not allow for application of CR 60 to unappealed and therefore final *Department* decisions because those decisions are not “appeals.” No appellate process is used in reaching an original Department decision during claim adjudication.⁸ CR 60 thus cannot expand the time for parties to protest or appeal a Department order.

In the Industrial Insurance Act statutory scheme, making CR 60 relief available to the orders issued in the Board’s appeal proceedings under RCW 51.52.140 but not to Department orders makes sense. The Department is a “front-line” agency and performs claim administration,

⁸ See RCW 51.32.055; RCW 51.52.050; RCW 51.52.060. See Rutledge, *A New Tribunal In the State of Washington*, 26 Wash. L. Rev. 196 (1951) (describing ex parte nature of Department’s decision-making process and contrasting it with that of the Board). See also RCW 34.05.030(2)(c) (exempting Department decision-making process from requirements of Administrative Procedure Act).

whereas the Board is a “quasi-judicial” agency and conducts a hearing when a party aggrieved by a Department decision appeals. *Kaiser Aluminum & Chem. Corp. v. Dep’t of Labor & Indus.*, 121 Wn.2d 776, 780-81, 854 P.2d 611 (1993). The Board, like a court, conducts evidentiary hearings and renders its decisions with “findings and conclusions as to each contested issue of fact and law, as well as the order based thereon.” RCW 51.52.104, .106. The Board proceedings thus create a record for review when a party requests CR 60 relief from *its* decision. In contrast, there are no hearings in the Department process and no requirements for the Department to make findings or explain the bases of its decisions. Further, the volume of Board decisions is minuscule compared to that of Department decisions, because not all Department decisions are appealed to the Board. Applying CR 60 to Department orders may delay benefits to injured workers because of increased administrative burden on the front-line agency associated with making findings and explaining bases of decisions. *See* RCW 51.04.010 (a purpose of the Industrial Insurance Act is to provide quick and certain relief to injured workers).

Presumably, the Legislature was aware of the procedural differences between decision-making at the Board and the Department, and for that reason made the Civil Rules, including CR 60, applicable to the Board only. CR 60 cannot be used to challenge an unappealed Department order.

3. The express limit on the Department's ability to set aside its own orders in RCW 51.32.240 is inconsistent with applying CR 60 to unappealed Department orders

The Department has limited statutory authority to set aside orders, which is inconsistent with availability of CR 60 relief at the Department level.⁹ RCW 51.32.240 provides the sole pertinent statutory basis for the Department's ability to correct erroneous adjudications on its own. RCW 51.32.240 was adopted in direct response to decisions of the Supreme Court holding that the Department lacked independent authority to correct its own decisions for error. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 298-99, 916 P.2d 399 (1996). But even under RCW 51.32.240, the Department's ability to correct errors is narrow and limited.¹⁰

⁹ CR 60 allows a court to set aside only *its own* decision, not that of another court. See Wright & Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 2865 at 377 (noting that the parallel FRCP 60(b) motion is filed with the court that rendered the judgment). While Wright & Miller & Kane does note that an independent action under FRCP 60's parallel provision to CR 60(c) may be brought in another court, the other court must have independent jurisdiction. See Wright & Miller & Kane, § 2868 at 404. A superior court has no jurisdiction to consider an independent action in an industrial insurance case. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 176-77 n.7, 937 P.2d 565 (1997) (plurality opinion); *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 220, 752 P.2d 1357 (1988).

¹⁰ There is also a corrective mechanism in the social security offset statutes, RCW 51.32.220 and .225. These statutes have no bearing on the present appeal. RCW 51.32.160, the aggravation statute, and RCW 51.28.040, the change of circumstances statute, allow the Department to "correct" its own decisions but those statutes do not directly pertain here because under both statutes a change in circumstances is required before the Department can act. See, e.g., *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 298 P.2d 1117 (1956) (RCW 51.32.160); *Hyatt v. Dep't of Labor & Indus.*, 132 Wn. App. 387, 396-97, 399-400, 16 P.3d 148 (2006), *review denied*, 159 Wn.2d 1004 (2007) (RCW 51.28.040).

Subsection (1) of RCW 51.32.240 allows the Department and self-insured employers to recoup payments made under erroneous, but otherwise final and binding, adjudications in certain non-fraud circumstances, so long as the Department makes the correction within one year of payment. Circumstances in subsection (1) of the statute include “clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient mistakenly acted upon, or any other circumstance of a similar nature . . .” Subsection (2) allows recipients of benefits who fail to receive them because of “clerical error, mistake of identity, or innocent misrepresentation” to request adjustment of benefits within one year from the incorrect or missed payment. This subsection does not permit adjustment of erroneous but final payment orders because of “adjudicator error,” nor does it permit challenge of orders for any reason that do not relate to *failures to pay* benefits. Subsections (3) and (4) allow the Department to correct mistaken decisions and recoup erroneous payments in certain other circumstances unique to workers’ compensation law. Subsection (5) allows the Department to recoup erroneous payments in the case of willful misrepresentation, so long as the Department demands recoupment within three years of the discovery of the willful misrepresentation.

Several of these circumstances in RCW 51.32.240 are covered in CR 60 (*e.g.*, fraud, clerical error, mistakes). The Legislature is presumed not

to engage in meaningless acts. *Price v. Kitsap Transit*, 125 Wn.2d 456, 468, 886 P.2d 556 (1994). If the Department already had the power to correct its errors without the statutory authority under RCW 51.32.240, then there was no need to adopt the statute. But, as the courts have recognized, the Department lacked such power. Indeed, cases noting the Department's lack of authority to self-correct were in fact the genesis of RCW 51.32.240. See *Stuckey*, 129 Wn.2d at 298-99; *Deal v. Dep't of Labor & Indus.*, 78 Wn.2d 537, 477 P.2d 175 (1970).

Furthermore, the Legislature's express designation of specific exceptions to the finality rule implies exclusion of those not mentioned. See *Whatcom County v. Brisbane*, 125 Wn.2d 345, 351, 884 P.2d 1326 (1994). The express, detailed list of correctible errors in RCW 51.32.240 shows the Department lacks authority to correct its erroneous decisions in other situations. This limited and specifically enumerated authority for the Department to correct its own errors in RCW 51.32.240 precludes CR 60 relief to Department orders.

Above and beyond *implied* exclusion of circumstances not listed in RCW 51.32.240, the statute *expressly* requires parties aggrieved by erroneous orders based on information in the claim file (i.e., situations of "adjudicator error") to appeal within the 60-day protest or appeal period of

RCW 51.52.050 and .060. RCW 51.32.240(2)(b). Limiting remedies for

“adjudicator error,” RCW 51.32.240 states:

The recipient may not seek an adjustment of benefits because of adjudicator error. Adjustments due to adjudicator error are addressed by the filing of a written request for reconsideration with the department of labor and industries or an appeal with the board of industrial insurance appeals within sixty days from the date the order is communicated as provided in RCW 51.52.050.

RCW 51.32.240(2)(b). The Legislature in turn defined “adjudicator error” as including “the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.” *Id.* Thus, parties aggrieved by clear error in the Department’s claim adjudication must timely protest or appeal.

RCW 51.32.240(2)(b)’s requirement that adjudicator error be corrected by timely appeal is consistent with *Marley*’s holding that even a clear error in the Department’s unappealed order does not open it to challenge. *Marley*, 125 Wn.2d at 537, 542-43. Under RCW 51.32.240(2)(b), a protest or appeal in the statutorily specified period is the sole means to challenge Department orders for adjudicator error.

The elaborate statutory scheme of the Industrial Insurance Act precludes application of CR 60 to unappealed Department orders.

4. No precedent grants CR 60 relief to excuse untimely appeal from an agency order, let alone untimely appeal from a Department order

No authority extends CR 60 relief to decisions of the Department.

All industrial insurance cases where courts have awarded equitable relief appear to rest on courts' inherent equitable authority, not under CR 60 as such. *See, e.g., Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 513, 30 P.2d 239 (1934); *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 954, 540 P.2d 1359 (1975); *Dep't of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459-60, 45 P.3d 1121 (2002); *Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 395-99, 3 P.3d 217 (2000). The Department is unaware of any authority outside the industrial insurance context where CR 60 has been applied to expand the statutory appeal period from an administrative agency action.

One Supreme Court industrial insurance case contains discussion in a plurality opinion of CR 60 relief from Department orders. *See Kingery*, 132 Wn.2d at 172-78. The *Kingery* plurality noted that if the widow had "timely appealed the Department order to the Board," she could have pursued CR 60 remedies from the Board's order, because the Board adopted the Civil Rules. *Id.* at 172. The plurality, upon the widow's contention she was entitled to CR 60 relief from the untimely appealed Department order, apparently in the alternative, denied both

equitable and CR 60 relief because she did not pursue it within a reasonable time. *Id.* at 177 n.7.

A subsequent Court of Appeals opinion upheld the grant of equitable relief to an employer in an industrial insurance case, describing in dicta the *Kingery* plurality as supporting that “CR 60 and/or ‘the court’s equitable powers’” permit grant of relief under appropriate circumstances. *Fields Corp.*, 112 Wn. App. at 459 (internal quotation omitted). However, this description of *Kingery* is loose language. The *Kingery* plurality does not support the premise that an unappealed *Department order* can be revived under CR 60. The *Kingery* plurality’s discussion of CR 60 assumed a hypothetical timely appeal of the Department order. *Kingery*, 132 Wn.2d at 172. And, as noted above, *Kingery* denied both equitable and CR 60 relief to the widow. *Id.* at 177 n.7. Further, *Fields Corp.* appears to affirm the trial court’s grant of equitable relief under courts’ inherent authority, not CR 60. *See Fields Corp.*, 112 Wn. App. at 455.

The *Fields Corp.* court’s overbroad description of the *Kingery* plurality opinion would undermine the res judicata rule of *Marley* with respect to erroneous unappealed Department orders. Yet, *Kingery* explicitly declined to overrule *Marley*. 132 Wn.2d at 177 (plurality opinion).

5. Public policy supports inapplicability of CR 60 to Department orders

Permitting CR 60 to expand the statutory time period for challenge of Department orders would be unsound public policy. If CR 60 relief is available to claimants, then it is equally available to employers and other parties with interests adverse to claimants. Parties' long-settled expectations are frustrated by application of CR 60.

B. Mr. Pearson's Failure to Timely Appeal the Department's Final Wage Order Precludes His Belated Challenge to the Order and Mandates Summary Judgment for the Department

Based on undisputed facts, the Department's unappealed December 12, 2006 wage order is res judicata. *Marley*, 125 Wn.2d at 537. The Department's cross motion for summary judgment should have been granted, because res judicata and/or direct estoppel bar the three present appeals, each of which is related to the finality of the December 12, 2006 wage order. Mr. Pearson received the December 12, 2006 wage order on December 15, 2006. CABR, Tr. 8/5/08, at 9-10. His receipt triggered his obligation to file a written protest or appeal within 60 days under RCW 51.52.050 and .060. This Mr. Pearson failed to do. The Department had personal and subject matter jurisdiction to enter the December 12,

2006 wage order.¹¹ Mr. Pearson asserts only erroneous adjudication, not that the order was void when entered.

The factual circumstance presented here falls squarely under *Marley*. Like Mrs. Marley, Mr. Pearson failed to protest or appeal a Department order in a timely fashion, and like Mrs. Marley, Mr. Pearson is barred by res judicata from challenging the correctness of the order. Mr. Pearson's first written protest following the December 12, 2006 wage order was submitted in March 2007. This is outside the 60-day period plainly provided by the Legislature for affected parties to appeal decisions of the Department. While it turns out the Department's final wage order was in error as to whether Mr. Pearson's employer contributed toward his housing and meals at time of injury, the mere fact of this error does not relieve Mr. Pearson of the effects of res judicata. *Marley*, 125 Wn.2d at 537-43. Just as failure to appeal a clearly erroneous legal determination does not prevent operation of res judicata, failure to appeal facts that were, in retrospect, erroneously determined here by the Department does not prevent operation of res judicata.

The superior court appears to have determined the Department's order is a "mistake" or "irregularity" or deviation from the "proper mode

¹¹ Upon Mr. Pearson's timely written protest of the July 11, 2006 wage order, the Department had not only jurisdiction, *see* RCW 51.08.178, but a duty to issue a further order adjudicating wage issues, as it here did on December 12, 2006.

of proceedings” on the rationale that the claims manager did not properly consider the investigation report or other information in the claim file. *See* CP at 7-10; VRP at 9-10. Yet, Mr. Pearson is precluded from relief under RCW 51.32.240(2)(b). If Mr. Pearson believed his claims manager failed to consider or secure adequate information about housing and meals provided by his employer, then Mr. Pearson needed to protest or appeal. RCW 51.32.240(2)(b) (limiting remedies for adjudicator error).

The superior court essentially ignored the Legislature’s explicit directive concerning adjudicator error and the Supreme Court’s decision in *Marley*, 125 Wn.2d at 537-43. The superior court should have denied Mr. Pearson’s motion for summary judgment and granted the Department’s cross motion for summary judgment. There are no material disputes of fact concerning the communication of the December 12, 2006 wage order and the absence of written protest or appeal within 60 days.

Res judicata and/or collateral estoppel controls Mr. Pearson’s three appeals. The doctrine of res judicata bars the relitigation of claims that were or might have been litigated in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata occurs when a prior judgment has a concurrence of identity with a subsequent action in the following four respects: “(1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons

for or against whom the claim is made.” *Rains v. Public Disclosure Comm’n*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Collateral estoppel refers to preclusion of subsequent suits that involve different claims but the same issue. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 595 (1993). The requirements for application of collateral estoppel are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice. *Id.* If subsequent litigation raises the same issue in a later suit on the same claim, this is termed “direct estoppel.” *Alcantara v. Boeing Co.*, 41 Wn. App. 675, 679, 705 P.2d 1222 (1985), *review denied*, 104 Wn.2d 1022 (1985). The Supreme Court has applied res judicata and collateral estoppel simultaneously. *Rains*, 100 Wn.2d at 665.

A Department order establishing a worker’s time-loss compensation rate is res judicata so long as the order advised the claimant of the basis of the Department’s rate calculation. An order establishing the time-loss compensation rate must set forth the Department’s understanding as to the claimant’s marital status, number of dependants, and the gross amount of monthly wages (or provide the formula for

calculating that figure) for purposes of RCW 51.08.178. If these elements are included, res judicata applies to an unappealed wage order. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837-38, 125 P.3d 202 (2005).¹²

Here, the three separate orders on appeal are challenged only insofar as they raise the same issue in the same claim: namely, whether Mr. Pearson's time-loss rate can be differently calculated in relation to housing and meals when he did not timely appeal the December 12, 2006 wage order that established his employer provided no housing and board.¹³ Therefore, Mr. Pearson's theory is barred by direct estoppel (as both res judicata and collateral estoppel apply). The December 12, 2006 order informed Mr. Pearson in unequivocal terms that the Department was setting his monthly wage, and explained how the wage was calculated, including that "NONE per month" was included for housing and board. CABR, Exhibit 1 at 56-57. It became final and binding when the protest or appeal period for the order passed that Mr. Pearson did not receive

¹² See also *VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 312, 16 P.3d 583 (2006); *Hyatt*, 132 Wn. App. at 395; *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 241-42, 16 P.3d 293 (2005), *review denied*, 157 Wn.2d 1002 (2006); *Somsak v. Criton Health Technologies/Health Tecna, Inc.*, 113 Wn. App. 84, 52 P.3d 43 (2002).

¹³ Mr. Pearson stipulated he challenged the other matters on his claim only insofar as they concerned the wage amount for time periods already paid. Tr. 8/5/08, at 6-8. In any event, Mr. Pearson did not prove, as was his burden under RCW 51.52.050(2)(a), that time-loss compensation was owed for additional periods or that further benefits were owed on the claim (apart from recalculated time-loss compensation for periods already paid).

housing or meals from his employer at time of his injury, regardless of whether this was actually true. Mr. Pearson is barred from re-litigating exclusion of housing and meals from his monthly wage.

Because the Department should be granted summary judgment, there is no impact on the accident or medical aid fund, so the superior court's award of reasonable attorney fees and costs to Mr. Pearson of undetermined amount under RCW 51.52.130 should be reversed.

C. Even if CR 60 Applied at the Department Level, Mr. Pearson Does Not Meet Its Criteria for Relief

Even if CR 60 applied at the Department level, Mr. Pearson does not meet its criteria because: 1) he failed to show fraud under CR 60(b)(4) and has since waived any argument this was shown; 2) his request under CR 60(b)(1) was not timely; 3) CR 60(b)(11) does not apply to the present facts; and, 4) Mr. Pearson's knowledge of underlying facts at time of the December 12, 2006 wage order precludes all CR 60 relief.

Mr. Pearson alleged only fraud (i.e., "misrepresentation by the employer," CABR at 34) within one year of the Department's final wage order. Mr. Pearson since abandoned his argument as to fraud for failure to include it in his petition for review at the Board,¹⁴ which only argued

¹⁴ RCW 51.52.104; WAC 263-12-145; *Homemakers Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983); *Garrett Freightlines, Inc. v. Dep't of Labor & Indus.*, 45 Wn. App. 335, 346, 725 P.2d 463 (1986); *Rose v. Dep't of Labor & Indus.*, 57 Wn. App. 751, 756, 790 P.2d 201 (1990).

provisions (1) and (11) of CR 60(b). In any event, Mr. Pearson cannot prove necessary elements of fraud.¹⁵

Even if Mr. Pearson could otherwise establish that he was entitled to relief under CR 60(b)(1), which here he cannot because of his knowledge of underlying facts, *see discussion below*, he fails to meet the timeliness criteria of CR 60(b)(1). Requests for relief under CR 60(b)(1) must be within one year of entry of the order. CR 60(b). It was not until Mr. Pearson's post-trial brief at the Board (received by the Board on August 14, 2008, more than 20 months after the final wage order) that he explicitly alleged "mistake" under CR 60(b)(1). CABR at 44-45.

CR 60(b)(11) is a narrow form of relief that does not apply here. Where CR 60 applies, a case may potentially fall under either CR 60(b)(1)-(10) or CR 60(b)(11), not both. The provisions are

¹⁵ In order to prove fraud, nine common law elements must be met by clear, cogent, and convincing evidence: 1) representation of an existing fact; 2) its materiality; 3) its falsity; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) the speaker's intent that it should be acted upon by the person to whom it is made; 6) ignorance of its falsity on the part of the person to whom it is made; 7) the latter's reliance on the truth of the representation; 8) the latter's right to rely upon it; and, 9) consequent damage. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 370, 777 P.2d 1056, *review denied*, 113 Wn.2d 1029 (1989). The fraudulent conduct must cause the judgment such that the relying party lost the opportunity to present a defense. *Id.* at 372 (assessing fraud in context of CR 60(b)(4) motion). Mr. Pearson was not induced by any party to not protest or appeal the Department's final wage order. Mr. Pearson disagreed with that order when it was issued for the same reasons as now. In addition, Mr. Pearson failed to prove that any representative of the employer acted with specific intent to defraud, *see CABR, Testimony Sloboda, Tr. 8/5/08, at 41-43*, among other requisite elements, such as his ignorance of falsity, nor reliance on truth of the employer's assertions, nor right to so rely.

mutually exclusive.¹⁶ *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 305, 122 P.3d 922 (2005). Moreover, CR 60(b)(11) applies only in “extraordinary circumstances.” *Id.*; *In re Welfare of MG*, 148 Wn. App. 781, 793, 201 P.3d 354 (2009); *In re Marriage of Knutson*, 114 Wn. App. 866, 873, 60 P.3d 681 (2003). CR 60(b)(11) relief is also appropriate only for irregularities extraneous to the action of the court or for questions concerning regularities of the court’s proceedings. *Knutson*, 114 Wn. App. at 873. Even if the Department’s action could be substituted for that of the court, the calculation of wages is not extraneous to the Department’s adjudication of Mr. Pearson’s claim and the Department’s actions were regular, even if its order was erroneous. Extraordinary relief under CR 60(b)(11) is not justified under the facts here present.

Where CR 60 applies, CR 60(b) does not permit relief from a judgment for mistakes of fact when such facts are known at the time of the order. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985) (stating upon appeal from denial of motion to vacate stipulated order of paternity under CR 60(b)(1) and (4) that, where photos of child that petitioner later asserted were evidence of racial characteristics other than his own were in his possession at the time he signed the stipulation, argument is “not well

¹⁶ Indeed, the Superior Court erred by granting relief under both CR 60(b)(1) and (11). *See CP* at 7-10.

taken.”). A party who knows a judgment is mistaken must timely appeal it. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450, 618 P.2d 533 (1980) (“The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion.”). An order that is not timely challenged despite knowledge of its error by the aggrieved party is not a “mistake” for purposes of CR 60.

While Mr. Pearson was confused about why the Department did not include the value of his housing and meals, he knew he received such amenities. Mr. Pearson previously and properly exercised protest rights for the same bases. CABR, Exhibit 1 at 6-8 (protest of initial wage order). Mr. Pearson also knew what his employer had reported to the Department concerning the issue, as he and his claims manager talked repeatedly about it. *See* Testimony Pearson, Tr. 8/5/08, at 15-23; Testimony Vaughn, Tr. 8/5/08, at 31. This knowledge defeats his CR 60 claim,¹⁷ even if CR 60 applies to the Department’s claim adjudication.

Further, assuming for sake of argument that CR 60 allows the Department to set aside its own final decisions, this case must be

¹⁷ This knowledge likewise defeats Mr. Pearson’s claim for relief under courts’ inherent equitable authority. *See discussion below* in Section VII.E. Where a party can determine the law and has knowledge of the underlying facts, relief in equity cannot be granted. *Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). *See also Rosenberg v. Rosenberg*, 141 Wash. 86, 90, 250 P. 947 (1926) (parties are estopped from litigating issues of which they had knowledge at the time of an earlier settlement).

remanded to the Department for an initial decision under CR 60. The Board's and the superior courts' role in reviewing Department decisions is purely appellate. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-62, 879 P.2d 326 (1994), *review denied*, 125 Wn.2d 1019 (1995). Accordingly, even if the Department has authority to apply CR 60 and review its own unappealed orders, this assumed power would not give the Board or the superior court authority to apply CR 60 as if they had *original jurisdiction*. Rather, acting in their *appellate jurisdiction* capacity, the Board and the superior court would have power to set aside the Department's CR 60 decision only on a showing of a manifest abuse of discretion by the Department. *See Pybas v. Paolino*, 73 Wn. App. 393, 869 P.2d 427 (1994) (CR 60 decision of court reviewed for manifest abuse of discretion). Thus, if this Court were to determine that CR 60 applies to Department orders, the Court should remand this case to the Department to exercise its discretion in the first instance to consider whether relief is warranted under CR 60.

D. This Court Should Decline to Consider the Superior Court's Oral Rulings Because They Are Not Expressed In and Are Different From the Superior Court's Written Order

Appellate courts may consider a superior court's oral decision to the extent it is consistent with, or explains, the superior court's written ruling. *See Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)

("[I]f the court's oral decision is consistent with the findings and judgment, it may be used to interpret them.").

Here, the superior court made oral rulings which suggested equitable relief by exercise of inherent power, stating that Mr. Pearson diligently pursued his rights and relied on his attorney to timely challenge the final wage order. CP at 21; VRP at 7-8. However, the superior court's written order is limited to CR 60(b)(1) and/or (11). CP at 7-10. The written order does not address the court's inherent equitable authority. Nor is there any finding about Mr. Pearson's diligent pursuit of his rights or reliance on his attorney. *Id.* The matters addressed in the court's oral rulings are entirely separate from the court's written bases for relief. To the extent CR 60 is separate from courts' inherent powers of equitable relief, the superior court's oral rulings about equitable relief do not explain the written order granting relief under CR 60. The oral rulings were here "within the breast of the court' until it entered its formal findings." *Quigley v. Barash*, 135 Wash. 338, 237 P. 732 (1925) (internal citation omitted).

Indeed, the superior court rejected the Department's proposed order that would have memorialized the court's oral ruling granting relief under inherent equitable authority. CP at 17-20 (Department's proposed order). Immediately before entry of the superior court's written order, the

Department specifically argued that CR 60 does not apply to Department orders. VRP at 9-10. The court's rejection of the proposed order that addressed inherent equitable relief and absence of mention of such relief in its final written order each mean the court's implicit rejection of inherent equitable relief as a basis for its decision. The court's oral rulings are *inconsistent* with its ultimate determination expressed in the written order. Thus, this Court should not consider the superior court's oral rulings.

E. If This Court Considers the Superior Court's Oral Rulings Granting Relief Under Inherent Authority, the Court Should Reverse the Rulings Because They Depend on Facts Not Supported by the Record

If this Court considers the superior court's oral rulings referencing its inherent equitable authority, the Court should reverse such rulings because the rulings are based on facts not in the record.

The superior court orally ruled that Mr. Pearson diligently pursued his rights by hiring an attorney in time to have protested or appealed the December 12, 2006 wage order by the statutory deadline. CP at 21. One document in the record¹⁸ contains a signature, apparently of Mr. Pearson, on a protest filed with the Department beyond the 60-day statutory deadline, and the date written below it was within the 60-day appeal

¹⁸ CABR, Exhibit 1 at 64-65 (notice of representation with general protest language).

period. The superior court orally stated the document was timely mailed, then perhaps lost in the mail but eventually delivered to the attorney's office, then immediately filed with the Department. VRP at 7-8.

However, there is no evidence, and Mr. Pearson did not testify, he signed the document on the date written below the signature. Nor is there any evidence he provided this document to his attorney on or around that date. There is *no testimony or evidence* in the record concerning *mailing* of the notice of representation, CABR, Exhibit 1 at 64-65, nor any testimony or evidence concerning Mr. Pearson's counsel's receipt of the document. No testimony or evidence contains *any* reference to the signed notice of representation. Mr. Pearson did not even argue he diligently pursued his rights within 60 days of communication of the final wage order; with respect to this period (as opposed to actions predating December 12, 2006), he argued only that he demonstrated diligence by the fact his appeal was weeks, not years, late. *See* CP at 62-73, 29-35.¹⁹

The superior court orally ruled that Mr. Pearson detrimentally relied on his attorney to timely challenge the Department's final wage order. CP at 21. Yet, Mr. Pearson did not testify, and did not argue, that he relied on his attorney.

¹⁹ *See especially* CP at 34: "The fact his appeal of the second incorrect order was late by 28 days, should not override the fact the worker's compensation statute's 'beneficent provisions should not be limited or curtailed by a narrow construction.'" (citation omitted).

The Board record is the sole basis for courts' review in appeals under the Industrial Insurance Act. RCW 51.52.115. The superior court's oral findings that Mr. Pearson signed and timely mailed the document to his attorney, but the document was lost in the mail, VRP at 7-8, are made up out of thin air.²⁰ The Board record *contradicts* such findings. Mr. Pearson nowhere stated he believed his attorney would timely challenge the Department's final wage order. He testified he thought he phoned his claims manager and that this constituted a timely appeal.

²⁰ It is especially apparent that the superior court's supposed "inferences" are unsupported by the record through the court's explanation of its initial oral ruling:

There is lots of . . . different possibilities that could be inferred . . . one of which is that he put it in the mail and it didn't get mailed timely. That happens all the time. I'm actually quite familiar with that problem.

...

And if we are doing equity, I think you have to consider the fact that if somebody goes to the trouble of signing an order on a date before the deadline, they are probably not going to hold onto it, they are probably going to put it in the mail.

Now, [Mr. Pearson's] counsel has represented to the Court as an officer of the court that his office didn't receive it by that time. That leaves a lot of gray area, but that doesn't leave either one of them at fault, and it doesn't lead to a direct inference that either party held it, and that's the basis of the Court's ruling, that in that situation, where the only real piece of evidence that we have shows that he signed the authorization before the cutoff date. And if he went and put it in the mail and the mail was timely delivered, it would have gotten there on time, then in my opinion there is lots of different things that could have happened to have prevented that, and none of them would be anyone's fault.

So, I'm prepared to sign an order consistent with that.

VRP at 7-8. While the superior court explained that lost mail for a period of time or something of the sort demonstrated Mr. Pearson's diligence, the court pointed to no particular evidence in the record in support of this oral ruling. There is none.

CABR, Testimony Pearson, Tr. 8/5/08, at 22. Mr. Pearson would have entrusted this matter to his representative if he had believed he hired one. *See* CABR, Testimony Pearson, Tr. 8/5/08, at 17 ll. 18-22 (“Actually, I did not get back in touch with [my claims manager] once I started with my counsel. Q: That is what you expected your attorney to do for you, correct? A: Correct.”).

In any event, the “inferences” orally drawn by the superior court are inconsistent with the summary judgment standard of construing facts in the light most favorable to the non-moving party. The superior court orally granted Mr. Pearson’s motion for summary judgment by construing “inferences” in *his* favor. CP at 21 (minute entry: “THE COURT IS WILLING TO CONSTRUE THIS IN MR. PEARSON’S FAVOR, NOTING THAT THERE NEEDS TO BE SUBSTANTIAL JUSTICE.”), VRP at 7-8. This is a legal error, which this Court should reverse.

F. Equitable Relief is Available Only in Extraordinary Circumstances for Diligent Claimants, and the Record Does Not Support Equitable Relief in This Case

Finally, if this Court considers the superior court’s oral rulings, granting inherent equitable relief under the facts of this case is an abuse of discretion. Courts have recognized they have a “very narrow equitable power” in industrial insurance cases that is “rarely exercised.” *Kingery*, 132 Wn.2d at 173 (plurality opinion). Given that courts use equitable

relief “sparingly,” *Rabey*, 101 Wn. App. at 395, and are “reluctant to expand the power of equitable relief in industrial insurance cases,” *Id.*, this Court should reverse the superior court’s vast expansion of principles of equity here. The differences between this case and cases where courts have allowed relief in equity illustrate that equitable relief is not here appropriate.

In *Rabey v. Dep’t of Labor & Indus.*, the court excused in equity a survivor’s failure to timely apply for benefits when she was “devastated” and struggled with day to day responsibilities following the death of her husband, who worked for the same employer. 101 Wn. App. at 392. Mrs. Rabey timely approached her employer’s human resource manager to ask about filing a claim; the manager stated she would follow up with Mrs. Rabey if she had a viable claim, but the manager then failed to follow up. *Id.* This led Mrs. Rabey to reasonably believe she had no claim. *Id.* at 398. *Rabey*’s facts therefore border on employer claim suppression. When advised after the claim filing deadline of its viability, Mrs. Rabey immediately filed a claim, thereby demonstrating her diligence. *Id.* at 393.

The *Rabey* court limited that case to its facts. Division Three, the same court that decided *Rabey*, declined to extend *Rabey* to a different set of facts two years later in *Harman v. Dep’t of Labor & Indus.*, 111 Wn. App. at 927. *Harman* involved a Hanford worker who filed an

industrial injury claim with the Department 16 months after her injury but mistakenly believed her report of injury to her employer three months after the injury constituted a claim. 111 Wn. App. at 922. The worker saw a physician in her employer's health clinic upon report of her injury to her employer. The worker was notified the examination was not a claim for benefits, but that a claim application form was available through the worker's employer, the health clinic, a physician, or the Department. *Id.* at 922-23. The employer did not report the injury to the Department as required by law. *Id.* at 927. The worker then saw another physician, whose staff the worker says told her she had seven years in which to file a claim. *Id.* at 923. The superior court excused the worker's late filing in equity based on the failure of the second physician and the Department to notify the worker of her rights. *Id.* The *Harman* court reversed the superior court's grant of equitable relief for abuse of discretion. *Harman*, 111 Wn. App. at 927. In so doing, *Harman* described *Rabey* as an application of equity to a "narrow set of facts in order to avoid a harsh consequence that was not caused by any lack of diligence on the part of the Rabey family." *Harman*, 111 Wn. App. at 926.

Mr. Pearson is ineligible for equitable relief because he, an adult able to handle his affairs, did not diligently file a written protest or appeal. Mr. Pearson was advised of his rights to protest or appeal and how and

when he must do so. CABR, Exhibit 1 at 55-57. Mr. Pearson read and understood the Department's final wage order and accompanying letter. CABR, Testimony Pearson, Tr. 8/5/08, at 21-22; Exhibit 1 at 6-8. Mr. Pearson presented no evidence of feeling devastated following his injury. Mr. Pearson's frequent interaction with his claims manager, *see, e.g.*, CABR, Testimony Vaughn, Tr. 8/5/08, at 31, demonstrates his capacity to have protested or appealed. No evidence supports Mr. Pearson detrimentally relied on another. Mr. Pearson's situation is like Ms. Harman's, not Mrs. Rabey's.

It is anticipated Mr. Pearson will argue that *Dep't of Labor & Indus. v. Fields Corp.*, 112 Wn. App. at 456-61, aids him. This is not so. While *Fields Corp.* supports that courts' equitable powers are not limited to only cases where the worker is incompetent²¹ or illiterate²², the decision still requires that circumstances excuse the claimant's failure to appeal, and that claimants diligently pursue their rights. 112 Wn. App. at 459-60. No circumstances excuse Mr. Pearson's failure to timely appeal, and he

²¹ *See, e.g., Ames*, 176 Wash. at 510-13 (worker was mentally incompetent and physically confined in a mental institution when the Department sent an order to him at his home address despite knowing of his commitment; the Court permitted later challenge of this order under broad principles of equity).

²² *See, e.g., Rodriguez*, 85 Wn.2d at 950-54 (worker was an extreme illiterate, and at the time of the Department order closing his claim, the interpreter who aided him with past translations was hospitalized, and the worker's mother also fell ill and he drove out of state to see her for several months; Court permitted equitable relief under "special circumstances," citing *Ames*, when, upon his return he obtained translation of the closing order and promptly appealed).

did not diligently pursue his known and previously exercised rights despite his able capacity. Furthermore, unlike in *Fields Corp.*, where the Department offensively used res judicata as a basis for “extracting money,” the Department here uses res judicata defensively. *Id.* at 461 n.43. The *Fields Corp.* court suggested it would apply res judicata on the facts of that case if the doctrine was used defensively. *Id.*

Mr. Pearson’s situation is less sympathetic than in *Kustura v. Dep’t of Labor & Indus.*, where this Court declined to extend equitable relief to limited English proficiency workers who were available and mentally and physically competent at the time they received the Department orders, and no extraordinary circumstances prevented them from challenging the orders. 142 Wn. App. 655, 672-73, 175 P.3d 1117 (2008), *aff’d*, 169 Wn.2d 81, 233 P.3d 853 (2010). Mr. Pearson, who was English proficient, read and understood the December 12, 2006 wage order and demonstrated prior capacity to timely protest in writing from such orders. CABR, Testimony Pearson, Tr. 8/5/08, at 21-22; Exhibit 1 at 6-8.

A lack of diligence precludes equitable relief. *Rabey*, 101 Wn. App. at 398; *Fields Corp.*, 112 Wn. App. at 459-60. Stated more bluntly: “The principle applicable to the situation is tersely expressed in an ancient maxim: Equity aids the vigilant, not those who slumber on their rights.” *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 928,

185 P.2d 113 (1945). Under undisputed facts in the record, Mr. Pearson's failure to protest or appeal the Department's final wage order cannot be excused. His unproven phone call, even assuming he made one, does not satisfy the due diligence requirement as a matter of law.²³ Mr. Pearson is undeserving of equitable relief.

Application here of inherent equitable relief would furthermore override legislative intent. "Equity principles cannot be asserted to establish equitable relief in derogation of statutory mandates." *Rhoad v. McLean Trucking Co., Inc.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984) (quoting *Dep't of Labor & Indus. v. Dillon*, 28 Wn. App. 853, 855, 626 P.2d 1004 (1981)). The Legislature intended a 60-day appeal period for adjudicator error, as here. RCW 51.32.240(2)(b).

///

///

///

///

///

²³ The superior court did not discuss Mr. Pearson's possible subjective belief concerning his alleged oral protest as a basis for inherent equitable relief. CP at 21, VRP at 7-8. In any event, Mr. Pearson was clearly advised that protests or appeals must be in writing. CABR, Exhibit 1 at 55-57. Mr. Pearson read these instructions with respect to the final wage order. CABR, Testimony Pearson, Tr. 8/5/08, at 21-22. Mr. Pearson demonstrated prior knowledge of the process for challenge, having filed a written protest of the Department's initial wage order. CABR, Exhibit 1 at 6-8. Mr. Pearson showed no extraordinary circumstances preventing him from following this same process.

VIII. CONCLUSION

For the reasons stated above, the Department asks this Court to reverse the superior court's summary judgment for Mr. Pearson and remand this case to the superior court to enter an order granting the Department's summary judgment motion.

RESPECTFULLY SUBMITTED this 1st day of November, 2010.

ROBERT M. MCKENNA
Attorney General



ERIC D. PETERSON
Assistant Attorney General
WSBA #35555
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-5347

Appendix of Statutes and Rules

Former¹ RCW 51.32.240

Erroneous payments — Payments induced by willful misrepresentation — Adjustment for self-insurer's failure to pay benefits — Recoupment of overpayments by self-insurer — Penalty — Appeal — Enforcement of orders.

(1)(a) Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived.

(b) Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(c) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his discretion to waive, in whole or in part, the amount of any such timely claim where the recovery would be against equity and good conscience.

(2) Whenever the department or self-insurer fails to pay benefits because of clerical error, mistake of identity, or innocent misrepresentation, all not induced by recipient willful misrepresentation, the recipient may request an adjustment of benefits to be paid from the state fund or by the self-insurer, as the case may be, subject to the following:

(a) The recipient must request an adjustment in benefits within one year from the date of the incorrect payment or it will be deemed any claim therefore has been waived.

(b) The recipient may not seek an adjustment of benefits because of adjudicator error. Adjustments due to adjudicator error are addressed by the filing of a written request for reconsideration with the department of labor and industries or an appeal with the board of industrial insurance appeals within sixty days from the date the order is communicated as provided in RCW 51.52.050. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

¹ In 2008, the Legislature amended subsection (1) of RCW 51.32.240 for gender neutrality and amended subsection (4), which governs overpayments resulting from decisions reversed upon timely appeal. Laws of 2008, ch. 280 § 2. The amendments have no bearing on this case.

(3) Whenever the department issues an order rejecting a claim for benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for temporary disability benefits has been paid by a self-insurer pursuant to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the recipient thereof shall repay such benefits and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The director, under rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

(4) Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

(5)(a) Whenever any payment of benefits under this title has been induced by willful misrepresentation the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments and the amount of such total sum may be recouped from any future payments due to the recipient on any claim with the state fund or self-insurer against whom the willful misrepresentation was committed, as the case may be, and the amount of such penalty shall be placed in the supplemental pension fund. Such repayment or recoupment must be demanded or ordered within three years of the discovery of the willful misrepresentation.

(b) For purposes of this subsection (5), it is willful misrepresentation for a person to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled. Willful misrepresentation includes:

(i) Willful false statement; or

(ii) Willful misrepresentation, omission, or concealment of any material fact.

(c) For purposes of this subsection (5), "willful" means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits under this title.

(d) For purposes of this subsection (5), failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(e) For purposes of this subsection (5), a material fact is one which would result in additional, increased, or continued benefits, including but not limited to facts about physical restrictions, or

work-type activities which either result in wages or income or would be reasonably expected to do so. Wages or income include the receipt of any goods or services. For a work-type activity to be reasonably expected to result in wages or income, a pattern of repeated activity must exist. For those activities that would reasonably be expected to result in wages or produce income, but for which actual wage or income information cannot be reasonably determined, the department shall impute wages pursuant to RCW 51.08.178(4).

(6) The worker, beneficiary, or other person affected thereby shall have the right to contest an order assessing an overpayment pursuant to this section in the same manner and to the same extent as provided under RCW 51.52.050 and 51.52.060. In the event such an order becomes final under chapter 51.52 RCW and notwithstanding the provisions of subsections (1) through (5) of this section, the director, director's designee, or self-insurer may file with the clerk in any county within the state a warrant in the amount of the sum representing the unpaid overpayment and/or penalty plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of the worker, beneficiary, or other person mentioned in the warrant, the amount of the unpaid overpayment and/or penalty plus interest accrued, and the date the warrant was filed. The amount of the warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the worker, beneficiary, or other person against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department or self-insurer in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the worker, beneficiary, or other person within three days of filing with the clerk.

The director, director's designee, or self-insurer may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice to withhold and deliver property of any kind if there is reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property that is due, owing, or belonging to any worker, beneficiary, or other person upon whom a warrant has been served for payments due the department or self-insurer. The notice and order to withhold and deliver shall be served by certified mail accompanied by an affidavit of service by mailing or served by the sheriff of the county, or by the sheriff's deputy, or by any authorized representative of the director, director's designee, or self-insurer. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired or in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property that may be subject to the claim of the department or self-insurer, such property shall be delivered forthwith to the director, the

director's authorized representative, or self-insurer upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount, plus costs, claimed by the director, director's designee, or self-insurer in the notice. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

This subsection shall only apply to orders assessing an overpayment which are issued on or after July 28, 1991: PROVIDED, That this subsection shall apply retroactively to all orders assessing an overpayment resulting from fraud, civil or criminal.

(7) Orders assessing an overpayment which are issued on or after July 28, 1991, shall include a conspicuous notice of the collection methods available to the department or self-insurer.

Former² RCW 51.52.050

Service of departmental action — Demand for repayment — Orders amending benefits — Reconsideration or appeal.

Whenever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his or her last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia: PROVIDED, That a department order or decision making demand, whether with or without penalty, for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker, shall state that such order or decision shall become final within twenty days from the date the order or decision is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

Whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department, or may appeal to the board. In an appeal

² In 2008, the Legislature added provisions with respect to the effective date of Department orders awarding benefits and stays of benefits pending appeal. The Legislature also created numbered subsections. Laws of 2008, ch. 280 § 1. The amendments have no bearing on this case.

before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

RCW 51.52.060

Notice of appeal — Time — Cross-appeal — Departmental options.

(1)(a) Except as otherwise specifically provided in this section, a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board. However, a health services provider or other person aggrieved by a department order or decision making demand, whether with or without penalty, solely for repayment of sums paid to a provider of medical, dental, vocational, or other health services rendered to an industrially injured worker must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within twenty days from the day on which a copy of the order or decision was communicated to the health services provider upon whom the department order or decision was served, a notice of appeal to the board.

(b) Failure to file a notice of appeal with both the board and the department shall not be grounds for denying the appeal if the notice of appeal is filed with either the board or the department.

(2) Within ten days of the date on which an appeal has been granted by the board, the board shall notify the other interested parties to the appeal of the receipt of the appeal and shall forward a copy of the notice of appeal to the other interested parties. Within twenty days of the receipt of such notice of the board, the worker or the employer may file with the board a cross-appeal from the order of the department from which the original appeal was taken.

(3) If within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department directs the submission of further evidence or the investigation of any further fact, the time for filing the notice of appeal shall not commence to run until the person has been advised in writing of the final decision of the department in the matter. In the event the department directs the submission of further evidence or the investigation of any further fact, as provided in this section, the department shall render a final order, decision, or award within ninety days from the date further submission of evidence or investigation of further fact is ordered which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days.

(4) The department, either within the time limited for appeal, or within thirty days after receiving a notice of appeal, may:

(a) Modify, reverse, or change any order, decision, or award; or

(b)(i) Except as provided in (b)(ii) of this subsection, hold an order, decision, or award in abeyance for a period of ninety days which time period may be extended by the department for good cause stated in writing to all interested parties for an additional ninety days pending further investigation in light of the allegations of the notice of appeal; or

(ii) Hold an order, decision, or award issued under RCW 51.32.160 in abeyance for a period not to exceed ninety days from the date of receipt of an application under RCW 51.32.160. The department may extend the ninety-day time period for an additional sixty days for good cause.

For purposes of this subsection, good cause includes delay that results from conduct of the claimant that is subject to sanction under RCW 51.32.110.

The board shall deny the appeal upon the issuance of an order under (b)(i) or (ii) of this subsection holding an earlier order, decision, or award in abeyance, without prejudice to the appellant's right to appeal from any subsequent determinative order issued by the department.

This subsection (4)(b) does not apply to applications deemed granted under RCW 51.32.160.

(5) An employer shall have the right to appeal an application deemed granted under RCW 51.32.160 on the same basis as any other application adjudicated pursuant to that section.

(6) A provision of this section shall not be deemed to change, alter, or modify the practice or procedure of the department for the payment of awards pending appeal.

RCW 51.52.140

Rules of practice — Duties of attorney general — Supreme court appeal.

Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter. Appeal shall lie from the judgment of the superior court as in other civil cases. The attorney general shall be the legal advisor of the department and the board.

Civil Rule 60
Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.